

# Rules of Evidence (Civil Proceedings): Overview (the Dubai International Financial Centre)

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A Practice Note providing an overview of the rules governing disclosure and the admissibility of evidence in civil proceedings in the Dubai International Financial Centre (DIFC). It looks at the rules on the disclosure obligations of the parties, admissibility of evidence, witness evidence, the burden and standard of proof, as well as issues that arise in gathering cross-border evidence.

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Evidence is fundamental to the outcome of any civil litigation case. Usually, the facts in issue in a case must be proved by evidence, and the court will decide the case on the evidence adduced by the parties.

One of the most challenging aspects for any cross-border practitioner is to adapt to the differences in the rules of evidence taking in various jurisdictions. These differences are clear in the manner in which evidence is produced, the issues surrounding relevance and admissibility, the probative value attached by the courts to the various types of evidence, and the principles of burden and standard of proof across jurisdictions. Further, these disputes often give rise to situations where one of the parties to the litigation must produce evidence located in a jurisdiction foreign to the forum of proceedings. These are important legal issues that a practitioner should be aware of since they largely determine the way litigation is conducted in all the major civil law and common law systems around the world and ultimately influence its result.

This Note provides an overview of the rules of disclosure and evidence in civil proceedings in the Dubai International Financial Centre (DIFC). It looks at:

- The rules regarding the parties' disclosure obligations.
- Admissibility of evidence.
- Witness evidence.
- Expert evidence and the role of experts (court hired independent experts and party hired experts) in civil proceedings.
- The rules regarding the burden of proof and standard of proof in civil proceedings.
- The rules regarding cross-examination.
- Issues that arise in gathering cross-border evidence, including:
  - the applicable international treaties, agreements, and regulations governing cross-border evidence;
  - how to obtain foreign evidence for use in the DIFC civil proceedings; and
  - how to obtain evidence located in the DIFC for use in foreign civil proceedings.

## Rules of Evidence and Evidence in Domestic Proceedings

Part 29 of the Rules of the Dubai International Financial Centre Courts 2014 (RDC) provides the rules of evidence that regulate proceedings in the DIFC.

### Obtaining Evidence

#### Disclosure or Discovery Obligations

The RDC does not recognise the concept of voluntary disclosure. A party may inspect a document mentioned in:

- A statement of case.
- A witness statement.
- A witness summary.
- An affidavit.

(RDC 28.)

There are however various other documents a party may inspect, such as for example a document referred to in an expert report.

The court may order standard production of documents within a specific time, including all documents available to a party on which that party relies to support its case (RDC 28.15). This may include public documents and those in the public domain, except for any documents already submitted by another party. A party must also submit documents as required by law, the DIFC court rules, or a DIFC court practice direction. In practice, parties must include the requirement for standard production of documents in a case management order, generally issued after the first case management conference.

Also, a party may make a "Request to Produce" for documents in accordance with the requirements under RDC 28.17, which is modelled after the International Bar Association guidelines on production of documents, for example, a Red Fern Schedule setting out, among others, the description of the document in sufficient detail including reasons for production. Once a request is made the other party may object in the following circumstances:

- Lack of sufficient relevance or materiality.
- Legal impediment or privilege under the legal or ethical rules determined by the court to be applicable.
- Unreasonable burden to produce the requested evidence.
- Loss or destruction of the document that was reasonably shown to have occurred.
- Grounds of commercial or technical confidentiality that the court determines to be compelling.
- Grounds of special political or institutional sensitivity (including evidence that is classified as secret by a government or a public international institution) that the court determines to be compelling.
- Considerations of procedural economy, proportionality, fairness, or equality of the parties that the court determines to be compelling.

- Public interest.

(RDC 28.28.)

If the requesting party is not satisfied by the reasons given for the objection, it may apply to the court for a document production order. The court will consider the request and its objections before making an order to produce, or denying the production of the requested documents.

## Role of the Courts in the Evidence-Taking Process

The court's role during the evidence collection process is to ensure that evidence relevant to the proceedings is produced under the RDC. Parties are encouraged to submit evidence voluntarily, failing which the court may make relevant orders such as document production orders, witness summons, and orders for delivery up or even search orders (for more information on delivery up see *Other Mechanisms to Obtain Disclosure from an Adverse Party and Third Parties*).

The courts also play a role in ensuring that evidence is provided and used in accordance with the RDC and assessing whether evidence not in accordance with the RDC should be refused. It is also the court's role to determine whether a witness who provided a witness statement can amplify their statement and give evidence in relation to new matters. The court in *DIFC CFI-015-2018 (1) ED&F Man Capital Markets MENA Limited (2) ED&F Man Capital Markets Limited v (1) Sayyed Hussain (2) RJ O'Brien MENA Capital Limited (3) Stephen Ghallami* dismissed an application made by a defendant to exclude recordings made without express consent of another party (which is generally contrary to the UAE Penal Code) on the basis, among others, that regulated entities were required to maintain recordings under applicable regulations.

## Other Mechanisms to Obtain Disclosure from an Adverse Party and Third Parties

A party may apply for the production of documents by a person who is not a party to the proceedings. The court may issue an order when the documents requested from the third party are likely to support the applicant's case or adversely affect the other party's case, or when the production is necessary to dispose fairly of the claim or to save costs.

In certain instances, the court may require third parties to cooperate and provide documents. For example, in freezing orders and third-party debt orders, banks may be compelled to search bank accounts held by a debtor. These orders must meet the requirements under Rule 28.53.

A court may issue a so called "delivery up" order, for the delivery or preservation of evidence on application by a party to the dispute. Delivery up orders may be obtained without notice or even before proceedings are initiated. However, the court would not allow a party to conduct a "fishing expedition" by a document production order.

The court may also issue search orders in extreme cases to collect evidence through a physical search conducted under the supervision of an independent Supervising Legal Representative.

## Standard of Proof and Burden of Proof in Civil Proceedings

The DIFC courts apply a common law civil standard of proof, which is based on the balance of probabilities. The court may increase this burden depending on the dispute, for example, civil claims for fraud have a higher burden of proof than contractual disputes.

## Failure to Give Evidence at Trial: Consequences

If a party fails to provide evidence at trial, the opposing party may request the court to draw adverse inferences according to the evidence not produced. A witness statement or affidavit that is not confirmed at trial or not subject to cross-examination may also be struck out on application by a party. However, in the recent decision in *Muzoon Holding LLC v Arif Naqvi DIFC - CFI-080-2018*, the court, following the decision in *Wisznieski v Central Health Authority [1998] PIQR 324* held that there has to be a prima facie case against a defendant (who did not give evidence at trial) to answer before any such negative inference can be drawn at trial.

## Admissibility of Evidence

As a general rule, evidence of fact must be made by witness statement confirmed by a statement of truth, otherwise it will be inadmissible as evidence of the facts stated. Evidence for applications for freezing orders or search orders must be submitted by affidavit.

A party may apply to the court to rule the evidence as inadmissible (even if the evidence was included in agreed bundles) at any time before trial (and in rare cases, even during trial). In *Muzoon Holding LLC v Arif Naqvi DIFC - CFI-080-2018*, the court, following *Three Rivers DC v Bank of England (No.3) [2001] UKHL 16, [2003] 2 AC 1*, held that decision notices issued by regulators (such as the DFSA) are not admissible as direct evidence of facts in court.

The court may deem inadmissible any evidence submitted in a way that is contrary to the RDC.

## When to Apply

Applications to challenge admissibility of evidence are generally made as soon as a party becomes aware that another party wishes to submit evidence, but may be made at any time before trial (or even during the trial).

## Exclusionary Rules of Evidence

There are a number of reasons why a party may object to the request to produce, including:

- Lack of sufficient relevance or materiality.
- Legal impediment or privilege under the legal or ethical rules that the court determines to be applicable. This may also include any correspondence sent under without prejudice or other privilege.
- Unreasonable burden to produce the requested evidence.
- Loss or destruction of the document that is reasonably shown to have occurred.
- Grounds of commercial or technical confidentiality that the court determines to be compelling.
- Grounds of special political or institutional sensitivity (including evidence classified as secret by a government or a public international institution) that the court determines to be compelling.
- Considerations of procedural economy, proportionality, fairness, or equality of the parties that the court determines to be compelling.
- Public interest.

Under RDC 32.47, Part 32, offers for settlement must not be communicated to the trial judge or the judge (if any) allocated to conduct the trial until the case is decided.

## Discretion of Court to Exclude Evidence

The court may control evidence by giving directions on:

- The issues on which it requires evidence.
- The nature of the evidence that it requires to decide those issues.
- How the evidence is to be placed before the court.

(RDC 29.9.)

Under RDC 29.10, the court may use its power to exclude evidence that would otherwise be admissible.

## Witness Evidence: Oral and Written

Evidence in relation to applications prior to trial are generally provided by witness statements or affidavits. A party may apply to cross-examine any witness that has given evidence by such means subject to the discretion of the court.

At trial, evidence-in-chief is generally provided by way of witness statements. The opposing party can cross-examine the witness if it so requires, without the need to apply for permission from court.

## Requirements for the Content of Written Evidence (Witness Statement or Affidavit)

A witness statement must comply with Rule 29 and must contain:

- Full name of the witness.
- Witness' place of residence, or if they are making the statement in their professional capacity, their occupation and place of work.
- Whether the witness is a party or an employee of a party, or is authorised by a party to provide evidence.
- A statement of truth.

An affidavit must comply with Rule 29.66 to 29.87 and must contain:

- Statements in the first person and mention their name and that they state on oath.
- Witness' place of residence, or if they are making the statement in their professional capacity their occupation and place of work.
- Whether the witness is a party or an employee of a party.
- A jurat. A jurat is a clause at the foot of the affidavit showing when, where, and before whom the affidavit was sworn.

The rules are similar for pre-trial applications and witness statements (evidence-in-chief) provided for trial.

## Oral Evidence in Support of Written Evidence

A witness who has provided a statement may, by direction of the court, be required to give evidence orally at a hearing. A witness who has provided a statement for trial as evidence-in-chief can be subject to cross-examination if the opposing party requires this, without the need for permission from court.

### **Timing for Filing Written Witness Evidence**

Written evidence is generally filed once the pleadings are completed and in accordance with a timeline ordered by the court following a case management conference. For applications made before starting proceedings (such as *ex parte* injunctions), evidence must be filed together with the application by affidavits or witness statements. The same practice applies to applications for court orders outside the general case procedure (for example, applications for security for costs or strike out applications).

### **Evidentiary Value of Witness Evidence**

A witness is entitled to provide the documents on which it relies as exhibits to their witness statement to add further evidentiary value. There is no specific distinction between the evidentiary value of contemporaneous documentary evidence and witness evidence.

### **Cross-Examination and Re-Examination**

A witness called to give evidence at trial may be cross-examined on the witness statement they provided, whether or not any part of the statement was referred to during the witness's evidence-in-chief (RDC 29.49).

A party may apply to cross-examine a witness when they provided a written statement at a hearing.

### **Witness Unwilling or Unable to Provide Evidence or Attend Court**

If a witness who is summoned or a deponent who must provide a deposition fails to appear, the witness can be held liable for contempt of court under RDC 30.47. The DIFC court has the jurisdiction to deal with matters relating to contempt and may exercise that jurisdiction by:

- Making any order it considers necessary in the interest of justice.
- Imposing fines.
- Referring the matter to the Attorney General of Dubai to initiate criminal proceedings.

(Article 43, DIFC Court Law.)

### **Witness Immunity**

There are no specific provisions dealing with witness immunity in the RDC. However, given that the DIFC courts follow English law precedents, the concept of witness immunity as recognised in English law would apply in the DIFC courts. The rules are similar for pre-trial applications and witness statements (evidence-in-chief) provided for trial.

### **Expenses**

A witness who is summoned must, at the time of service of the witness summons, be offered or paid a sum reasonably sufficient to cover any expenses in travelling to and from the court, and a sum as compensation for loss of time (under the relevant Practice Direction).

## Expert Witnesses

### Court-Appointed Experts

The court may appoint one or more independent experts to report on specific issues. While there is no official list of court experts, under RDC 31.30, the court will notify each party in writing of:

- The name of the proposed expert.
- The matter for which the opinion of the expert is sought.
- The qualifications of the expert to give that opinion.

The court would normally propose an expert based on its discretion, but will consider proposals and views from the parties in appointing the expert.

### Party-Hired Experts

A party should seek permission from the court before appointing an expert to give evidence. A party may be liable for costs if it appoints an expert witness without the court's permission.

Where a party wishes to call an expert witness or serve an expert's report, it should generally apply for a court order during the Case Management Conference.

### Fees of Expert Witnesses

Expert fees depend on the outcome of the case. The judge makes an order for these costs. Unless the court otherwise directs, the parties are jointly and severally liable for the payment of the court-appointed expert's fees and expenses (RDC 31.47). These costs would normally be recoverable by the winning party at the conclusion of the case.

### Role of Party-Appointed and Court-Appointed Experts

An expert has an overriding duty to help the court in matters within the expert's expertise (RDC 31.3). The role of a party-appointed and court-appointed expert is to provide independent and unbiased expertise, uninfluenced by the pressures of litigation. In addition, the expert must consider all material facts, including those that may weaken its opinion. The expert must also have read the Protocol for the Instruction of Experts to give Evidence in Civil Claims, which is found at Schedule A of the RDC.

### Presentation of Expert Evidence

The general rule is that expert evidence must be provided in written form unless directed otherwise. Experts may be cross examined at trial.

## **Documentary Evidence: Certification of Documents**

A party is deemed to admit the authenticity of a document produced under Part 28 (production of documents) of the RDC, unless that party serves notice of a request that the document be proved at trial (RDC 29.115).

## **Legal Framework Governing Cross-Border Evidence**

### **The Taking of Evidence Regulation**

The DIFC is not a party to the Taking of Evidence Regulation.

### **The Hague Evidence Convention**

The DIFC is not a party to the Hague Evidence Convention.

### **Any Other International Instrument(s)**

The DIFC (on its own) is not a party to any other international instruments or treaties on evidence.

## **Obtaining Evidence from Another Jurisdiction**

### **General Requirements**

#### **Form or Application Along with the Documents**

While there are no specific rules on obtaining witness or documentary evidence abroad, the court may issue requests for assistance in collecting evidence to other courts on an application of a party.

A notarial act or instrument may be received in evidence without further proof if duly authenticated in accordance with the requirements of law, unless the contrary is proved (RDC 29.117).

Under RDC 30.55, where a party wishes to take a deposition from a person who is out of the DIFC, they should make an application to the court, accompanied by supporting evidence. The registry will proceed to give directions on the required procedure, depending on the jurisdiction in which the party wishes to take evidence.

### **Notice Requirements**

The application for directions to obtain evidence abroad should be made with notice to all other parties. The other party will have an opportunity to challenge the evidence.

### **Grounds**

The RDC does not provide specific grounds to make an application to request evidence from abroad, although the court would be guided by the overriding objective of the court in allowing the application. The overriding objective enables the courts to deal with cases justly by:



- Ensuring that the parties are on an equal footing.
- Saving expense.
- Dealing with the case in ways that are proportionate to the:
  - amount of money involved;
  - importance of the case;
  - complexity of the issues; and
  - financial position of each party.
- Ensuring that it is dealt with expeditiously and fairly.
- Allotting to it an appropriate share of the courts' resources, while taking into account the need to allot resources to other cases.

#### **Costs and Expenses**

Initial costs of an application and the costs of obtaining evidence from overseas or foreign witness are normally payable by the party making the application unless otherwise ordered by the court. Normally, these costs would be recoverable if the party making the application succeeds with their claim.

#### **Application and Procedure Irrespective of the Applicable International Instruments (If Any)**

The court would consider the impact of any applicable international instruments (if any) before issuing directions under RDC 30.55.

#### **Admissibility of Overseas Evidence**

Evidence obtained following a court's direction would be admissible in court. The court would consider the impact of any applicable international instruments (if any) before issuing directions under RDC 30.55.

#### **Willing Witness (Unable to Travel)**

The DIFC court prides itself as a modern court and will allow a witness to give evidence by video link or other means, with sufficient reasons (RDC 29.14). Since COVID-19, all hearings in the DIFC courts are conducted remotely. The court will issue appropriate directions on how evidence may be given although, in practice, the court would require the witness to join the hearing through video calling software.

#### **Video-Link, Teleconference, or Depositions**

Under RDC 29.14, the court may allow any witness to provide evidence by video link. There are no specific restrictions on how this evidence is collected although the court will issue appropriate directions depending on the circumstances of the case and applications by the parties.

## Obtaining Evidence in Support of Foreign Litigation

### National Rules

The DIFC court may obtain evidence for other courts if:

- It is satisfied that the application is made by or on behalf of a court or tribunal in:
  - Dubai; or
  - any other part of the UAE; or
  - a country or territory outside the UAE.
- It is satisfied that the evidence to which the application relates is to be used for the proceedings brought before the requesting court or that the parties contemplate bringing proceedings before the requesting court.

The DIFC courts, in the case of *(1) Levent (2) Lexie v Lilika [2021] DIFC CFI 030*, assisted a US court in gathering evidence from witnesses in the UAE pursuant to a request for judicial assistance issued by the US court under RDC 30.65, 30.66 and 30.67.

### Direct Application

There are no specific laws applicable in the DIFC in relation to obtaining witness evidence for DIFC court proceedings.

### Procedure to Enforce Request for Witness Evidence

The court has the power to make any provision for obtaining evidence in the DIFC it deems appropriate to give effect to a request made by a foreign court, and an order listing appropriate steps that the court determines are appropriate to obtain that evidence.

The court will not compel a person to give evidence that the person could not be compelled to give:

- In civil proceedings in the DIFC.
- In civil proceedings in the country or territory in which the requesting court exercises jurisdiction where those grounds are supported by evidence.

The court will also not compel a person to give any evidence if it is deemed prejudicial to the security of the DIFC, Dubai, or UAE.

### Grounds

There are no specific grounds to enforce a request for witness evidence in support of foreign litigation although an application would need to generally demonstrate the need for the evidence.

The DIFC courts, in the case of *(1) Levent (2) Lexie v Lilika [2021] DIFC CFI 030*, assisted a US court in gathering evidence from witnesses in the UAE pursuant to a request for judicial assistance issued by the US court under RDC 30.65, 30.66 and 30.67. The court made the following conditions:

- The order will be framed so that the date of the examination will be a date to be fixed by the Registrar.
- The name of the examiner should be as approved by the Registrar, being one of the Attorneys named in the Letters Rogatory or another qualified practitioner.
- There will be a provision in the order that the documents sought be provided by each of the witnesses at a place and date prior to their examination, as directed by the Registrar.

### **Time Frame**

There is insufficient data to confirm exact time frames to execute a request, although the court generally makes an order within four to six weeks of concluding evidence.

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